1988

State of Utah v. Jerry Lee Velarde : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880211-CA
v.	:	
JERRY LEE VELARDE,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A DENIAL OF DEFENDANT'S MOTION TO WITHDRAW A GUILTY PLEA TO ATTEMPTED MAYHEM, A THIRD-DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-105 (1978), IN THE THIRD DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE RAYMOND S. UNO, JUDGE, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880211-CA
v.	:	
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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a denial of defendant's Motion to Withdraw a Guilty Plea to Attempted Mayhem, a third-degree felony, in violation of Utah Code Ann. § 76-5-105 (1978), in the Third Judicial District Court. This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-2a-3(2)(f)(Supp. 1988).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether this appeal is moot because defendant has served his sentence?

2. Whether the trial court properly denied defendant's Motion to Withdraw his Guilty Plea finding that defendant did not show "good cause" for withdrawal?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 77-35-11(e)(Supp. 1988):

> The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:
> (1) That if the defendant is not represented by counsel he has knowingly

> waived his right to counsel and does not desire counsel;
>
> (2) That the plea is voluntarily made;
>
> (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
>
> (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements:
>
> (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
>
> (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.
>
> If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a less included offense, or the dismissal of other charges, the same shall be approved by the court. If recommendations as to sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

Utah Code Ann. § 77-13-6 (1982):

> **Withdrawal of Plea.** A plea of not guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court.

STATEMENT OF THE CASE

Defendant, Jerry Lee Velarde, was charged with Mayhem, a second degree felony, in violation of Utah Code Ann.§ 76-5-105 (1978). Defendant pled guilty to Attempted Mayhem, a third degree felony, on January 24, 1984, in the Third Judicial District Court, in and for Salt Lake County, the Honorable Jay E.

Banks, Judge, presiding. Defendant was sentenced by Judge Banks on January 30, 1984, to a term or zero to five years in the Utah State Prison to be served concurrently with defendant's previous conviction.

STATEMENT OF THE FACTS

On August 30, 1983, defendant was arrested and charged with Mayhem, a second-degree felony (R. 3). The information alleged that defendant "jumped on the victim, Michael S. Terry, and bit off the upper portion of the victim's ear, completely tearing the upper portion away from the ear itself." (R. 11) (See Addendum "A"; Information). At the time of his arrest, defendant was on parole from the Utah State Prison for other felony crimes (R. 10). Following the arrest, defendant was returned to the Utah State Prison (R. 3).

At a preliminary hearing on September 8, 1983, defendant waived a formal reading of the information (R. 4). The victim, Michael S. Terry, testified that as a result of the assault by defendant, the upper portion of his ear was dismembered (R. 5). Defendant was present during the victim's testimony (R. 5). Based upon the evidence adduced, Judge Michael Hutchings bound defendant over to the district court for trial (R. 4).

Defendant was arraigned in the district court on September 30, 1983 (R. 12). A copy of the information was given to defendant and he entered a plea of "not guilty" to the Mayhem charge (R. 12). Defendant notified the court that he intended to rely on the defense of insanity (R. 13).

On December 1, 1983, in a collateral case, defendant was convicted of second-degree murder, a first-degree felony, and was sentenced to a term or five years to life in the Utah State Prison (R. 40).

On January 24, 1984, defendant entered a change of plea to the Mayhem charge (R. 16). At the change of plea proceeding, the information was read to the defendant and he entered a plea of "guilty" to Attempted Mayhem (R. 16) (See Addendum "B"; Transcript: Addendum "C"; Plea Affidavit). Judge Jay E. Banks sentenced defendant to a term of zero to five years in the Utah State Prison to run concurrently with defendant's second-degree murder conviction (R. 19-20).

On appeal to the Utah Supreme Court, the second-degree murder conviction was reversed and defendant subsequently pled guilty to Manslaughter, a second-degree felony. (R. 89, p. 2). Defendant was sentenced to serve one to fifteen years in the Utah State Prison for manslaughter (R. 89, p. 3).

On August 31, 1987, three and one-half years after defendant entered his guilty plea, defendant filed a Motion to Withdraw his Guilty Plea to Attempted Mayhem (R. 25). After a hearing, Judge Raymond S. Uno denied the motion (R. 25, 89). Defendant's motion was denied a second time after an evidentiary hearing on February 8, 1988 (R. 26, 40). No witnesses were called at the evidentiary hearing. Id. Finally a hearing was held on September 12, 1988 to once again determine if defendant's plea was voluntary. (Transcript dated September 12, 1988). After hearing the arguments of the parties, Judge Uno denied

defendant's motion for the third time (R. 77). Defendant now appeals the denial of his motion.

SUMMARY OF THE ARGUMENT

This appeal is moot since defendant has served his five-year sentence. Accordingly, this Court should not consider the merits of defendant's claims where no collateral consequences exist and defendant caused the matter to become moot through his failure to timely appeal.

The trial court did not abuse its discretion in finding that defendant's guilty plea was voluntary and knowing where a copy of the information was read to defendant, he was present during preliminary hearing testimony of the victim, and he acknowledged his willingness to enter a voluntary guilty plea both orally and in writing by admitting the elements of the offense after consulting with his attorney. Further, the trial court did not abuse its discretion in refusing to allow defendant to withdraw his guilty plea based on defendant's alleged misunderstanding of the consequences of the guilty plea; namely, that his prior second-degree murder conviction could and would be reversed on appeal. The record clearly establishes that defendant understood the statutory sentence for the offense charged and that the trial court could impose the maximum sentence to run concurrently or consecutively with defendant's other sentence.

ARGUMENT

POINT I

BECAUSE DEFENDANT'S SENTENCE HAS BEEN SERVED, THIS APPEAL IS MOOT.

Defendant pled guilty and was sentenced on January 24, 1984 to serve not more than five years in the Utah State Prison. (See Addendum "B"; Transcript). Defendant's sentence was completed on January 24, 1989. Thus, defendant's appeal is now moot.

The Utah Supreme Court has declined to consider appeals where the issues raised have become moot. In State v. Davis, 721 P.2d 894, 895 (Utah 1986), the defendant appealed claiming his sentencing orders were invalid and requested that the case be remanded for resentencing. The Supreme Court held that the matter was moot since the defendant had served his sentence. Id. see also Richardson v. State, 402 N.E.2d 1012, 1013 (Ind. App. 1980) (Appeal attacking sentence is moot where sentence has been completed). The Court said that "'[w]here the requested judicial relief can no longer affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits.'" Id. at 895, quoting, Spain v. Stewart, 639 P.2d 166, 168 (Utah 1981). The Court noted an exception to the mootness doctrine where there is a "continuing and recurring controversy." Davis at 895, citing, Wickham v. Fisher, 629 P.2d 896 (Utah 1981).

In Baker v. State, 240 Ga. 431, 241 S.E.2d 187 (1978), cert. denied, 439 U.S. 881 (1978) the Supreme Court of Georgia dismissed on appeal attacking the constitutionality of a criminal

statute where the issue had been rendered moot by the completion of the sentence. The Court observed that while an appellate court may exercise its discretion whether to decide a criminal case after the sentence has been served, it is not bound to do so. Id. at 188, citing, Jacobs v. New York, 388 U.S. 431 (1967); Tannenbaum v. New York, 388 U.S. 439 (1967) reh'g. denied, 689 U.S. 842 (1967). The Georgia Court chose not to reach the merits of the appeal "because the defendant has not demonstrated any efforts to expedite the appeal, preparation of record, etc., and has not shown, on this record, adverse collateral consequences . . ." Baker at 188 (citations omitted).

In Holmes v. United States, 383 F.2d 925 (D.C. Cir. 1967) the court held that an appeal was moot where the sentence was served and there were no collateral disadvantages which appellant may incur as a result of the conviction. Id. at 927. The Court found that where the defendant had been convicted of fourteen previous misdemeanor offenses, his fifteenth misdemeanor conviction did not create a collateral disadvantage. Id.

In the present case, defendant was incarcerated at the Utah State Prison for a second-degree murder conviction at the time of his guilty plea. Both the Homicide and Mayhem charge occurred while defendant was on parole from the Utah State Prison for other felony convictions (See Addendum "A"; Information).

Under these circumstances, it is apparent that no collateral consequences exist in light of defendant's previous felony convictions.[1]

Additionally, this Court should not exercise its discretion to decide a criminal case which has become moot as a result of defendant's own failure. As set forth above, Judge Uno denied defendant's first Motion to Withdraw Guilty Plea on August 31, 1987 (R. 25). Rather than pursue a direct appeal from the denial, defendant twice more requested that he be permitted to withdraw his plea (R. 26, 40, 77). Had defendant pursued an appeal from the first denial of his motion, his appeal would have been submitted to this Court prior to the termination of his sentence. Instead, defendant failed to expedite appellate review and the issue has now become moot. Therefore, this Court should not consider the merits of defendant's claims.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

A. Defendant's Guilty Plea Was Knowingly, Intelligently, And Voluntarily Entered.

Defendant claims that Judge Raymond S. Uno abused his discretion in denying his Motion to Withdraw his guilty plea. Defendant argues that his guilty plea was unknowing, involuntary

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[1] It should be noted that if defendant is permitted to withdraw his plea, he will again face the original Mayhem charge, a second-degree felony, and if convicted, may be sentenced to serve one to fifteen years in prison, a term longer than he has already served and which may be imposed consecutive to his Manslaughter sentence.

and unintelligent because he did not understand the consequences of his guilty plea. Defendant's claim is wholly without merit.

Utah Code Ann. § 77-13-6 (1982) provides that a plea of guilty may be withdrawn as follows:

> **Withdrawal of plea.** A plea of guilty may be withdrawn at any time prior to conviction. A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court.

Id. Accordingly, a criminal defendant may not withdraw a guilty plea as a matter of right, but only upon a showing of "good cause." State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963); State v. Harris, 585 P.2d 450 (Utah 1978). A motion to withdraw a guilty plea is addressed to the trial court's discretion. State v. Forsyth, 560 P.2d 337, 339 (Utah 1977); State v. Garfield, 552 P.2d 129 (Utah 1976). As in all discretionary matters afforded the trial judge's prerogatives as well as his advantaged position, reviewing courts accord considerable latitude to the trial judge's discretion and will not interfere "unless it plainly appears that there was abuse thereof," Forsyth, 560 P.2d at 339 (footnote omitted).

In the instant case, defendant failed to establish below that his plea was unknowing, involuntary or unintelligent. In Boykin v. Alabama, 395 U.S. 238 (1969), the United States Supreme Court held that it was reversible error for a trial court to accept a guilty plea without an affirmative showing in the record that it was made intelligently and voluntarily. In Boykin, the petitioner pled guilty to five indictments charging common law robbery and was sentenced to death. The judge asked

no questions of the defendant concerning his plea, and the defendant did not address the court. The Court stated:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury. . . . Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 243 (citations omitted). As a result of Boykin, minimum requirements were established which a court must meet when a defendant enters a guilty plea.

The United States Supreme Court in two decisions subsequent to Boykin further clarified the relationship between a knowingly and voluntarily entered plea and the defendant's constitutional rights. In Brady v. United States, 397 U.S. 742 (1970), and North Carolina v. Alford, 400 U.S. 25 (1970), the Court, citing Boykin, upheld guilty pleas as voluntarily and intelligently made without any indication that specification of the Boykin trilogy of constitutional rights was required to be made at the time of the acceptance of the pleas. In clarifying Boykin, the Court stated:

> [T]he new element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.

Brady, 397 U.S. at 747-48, fn. 4. The Brady court looked to the issue of voluntariness and intelligence of the person taking the plea without tying its analysis to the strictures of the Boykin

litany. The Court considered all relevant circumstances surrounding the guilty plea in order to determine its voluntariness. Likewise, in North Carolina v. Alford, 400 U.S. 25 (1970), the determination of whether a plea was made voluntarily and intelligently did not rest upon the structured questions of the Boykin litany, but rather upon the determination of "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Alford, 400 U.S. at 31.

In addition, other courts have differed as to how strictly the Boykin standard must be followed in guilty plea proceedings. A majority of courts have held that as a matter of constitutional due process, a defendant's constitutional rights to a jury trial, confrontation, and protection against self-incrimination need not be specifically and expressly articulated by the trial judge and expressly waived by the accused prior to the acceptance of the guilty plea. See e.g., Rouse v. Foster, 672 F.2d 649, 651 (8th Cir. 1982); Neely v. Duckworth, 473 F. Supp. 288 (N.D. Ind. 1979); Wilkins v. Erickson, 505 F.2d 761 (9th Cir. 1974); Stinson v. Turner, 473 F.2d 913, 915-16 (10th Cir. 1973); McChesney v. Henderson, 482 F.2d 1101, 1106-10 (5th Cir. 1973) cert. denied McChesney v. Henderson, 414 U.S. 1146 (5th Cir. 1974); Wood v. Morris, 87 Wash. 2d 501, 554 P.2d 1032, 1036 (1976); State v. Laurino, 106 Ariz. 586, 480 P.2d 342, 344 (1971).

In the instant case, the record is clear that defendant's guilty plea guilty plea was knowingly, voluntarily

and intelligently entered in accordance with Boykin. At the January 24, 1984 guilty plea hearing, Judge Banks questioned defendant to determine whether defendant's guilty plea was made knowingly, intelligently, and voluntarily (R. 88, p. 2-5) (See Addendum "B"; Transcript). The court asked defendant if he had reviewed his constitutional rights and the waiver thereof as set forth in defendant's affidavit. Id. at 2 (See Addendum "C"; Plea Affidavit). The Plea Affidavit, signed by defendant, fully explains the underlying facts of the charge, the elements of the offense, the maximum sentence which may be imposed, and the full array of constitutional rights that are waived by a guilty plea. Id. Defendant indicated that he had reviewed his constitutional rights and understood the rights he was waiving (Id.) Defendant was then afforded an opportunity to question the court about the waiver of his constitutional rights, which he declined. Id.

When defendant was asked if there had been any promises made to induce his guilty plea, defendant answered in the negative. Id. at 3. Defendant also denied the existence of any promises as to the sentence which may be imposed by the court and denied that any threat, duress, or any other undue influence was exerted on him to enter a guilty plea. Id.

The Court explained to defendant that by entering a guilty plea to the Attempted Mayhem charge, the conviction would carry a sentence of zero to five years in the Utah State Prison and/or a fine not exceeding $5,000. Id. The Court then asked defendant whether he was under the influence of any drugs, narcotics, or alcoholic beverages or whether defendant had any

physical or mental disability that would interfere with his ability to freely enter a guilty plea. Id. at 3-4. Defendant responded in the negative. Id.

The Court asked defendant how he pled to Attempted Mayhem, a third degree felony, occurring at 73 East 400 South, in Salt Lake County, in violation of Utah Code Ann. § 76-5-105 (1953, as amended), in that defendant attempted to commit mayhem upon Michael S. Terry by unlawfully and intentionally depriving Mr. Terry of a member of his body, to wit: an ear, and/or by unlawfully and intentionally slitting the ear of Michael S. Terry. (R. 88. p. 4; Addendum "B"). Defendant responded, "guilty." Id. The Court then entered findings that defendant's guilty plea was "freely and voluntarily made." Id.

Regardless of these facts, defendant asserts that his guilty plea was improperly entered because he did not understand the consequences of the guilty plea. As fully explained by the court, the direct consequences of defendant's guilty plea would be a prison sentence of zero to five years and/or a fine not exceeding $5,000. Id. at 3. The Court explained to defendant that the Court may order the sentence to run consecutively or concurrently with a sentence the defendant was presently serving in the Utah State Prison Id. at 5. Defendant was given a concurrent sentence. Defendant knew and unequivocably accepted the fact that he would receive a sentence of not more than five years in the Utah State Prison for the Attempted Mayhem conviction. The legal consequences of defendant's guilty plea, as understood by defendant at the time he entered his guilty

plea, remained exactly the same regardless of the subsequent sentence reduction in defendant's collateral case and irrespective of a policy change of the Board of Pardons.[2] The crux of defendant's present claim is that he did not know at the time of his plea to Attempted Mayhem that his second-degree murder conviction would be reduced to Manslaughter. Defendant's belated regret that he pled guilty to a reduced charge cannot be grounds for invalidating a voluntary, intelligent, and knowing guilty plea.

Notably, defendant fails to cite any legal authority for his claim that the trial court erred in not informing him that a concurrent five to life sentence on an unrelated change may be reversed on appeal. See State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984)(Appellant must support claim with relevant legal analysis and authority). Indeed, it appears to be a novel claim. However, to allow an unrelated and unpredictable future event to establish grounds to invalidate an otherwise knowing and voluntary guilty plea would be contrary to the public policy regarding the finality of criminal judgments. Cf. Codianna v. Morris, 660 P.2d 1101, 1105 (Utah 1983).

B. Defendant's Guilty Plea Was Entered In Compliance With Utah Code Ann. § 77-35-11(e)(Supp. 1988).

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[2] Defendant avers to a policy change of the Board of Pardons in support of his claim that he did not understand the consequences of his guilty plea. (Brief of App. at p. 6). However, because defendant fails to identify the policy change or specify how it is relevant to his legal claim, respondent is without sufficient information to directly respond. See State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984). In any event, a subsequent policy change of the Board of Pardons should not affect the voluntariness of a previously entered guilty plea.

1. The Gibbons Standard Does Not Apply To This Case.

Defendant contends that his guiltv plea was taken in violation of Utah Code Ann. § 77-35-11(e)(Supp. 1988). Defendant bases this claim on the application of State v. Gibbons, 740 P.2d 1309 (Utah 1987) which provides for a strict reading of Rule 11(e). However, defendant's application of the Gibbons standard in this case is misplaced.

As this Court stated in State v. Vasilacopulos, 756 P.2d 92 (Utah App. 1988) cert. denied State v. Vasilacopulos, 765 P.2d 1278 (Utah 1988):

> In the instant case, defendant entered his plea on February 17, 1984. Therefore, the strict Rule 11(e) compliance standard established under Gibbons in 1987 does not apply. See United States v. Johnson, 457 U.S. 537 (1982); State v. Norton, 675 P.2d 577 (Utah 1983) (when a new rule of criminal procedure constitutes a clear break with the past, it will not be applied retroactively). Rather, we will apply the Warner-Brooks test to determine whether the record as a whole affirmatively establishes defendant entered his plea with full knowledge and understanding of its consequences, namely the possibility of the imposition of consecutive sentences.

Vasilacopulos, at 94.

In the case at bar, defendant entered his guilty plea on January 24, 1984, three weeks before the defendant in Vasilacopulos entered his plea. Thus, because defendant's plea was entered prior to Utah Supreme Court's 1987 decision in Gibbons, that case is not controlling in the present case and defendant's request to reconsider the retroactivity of Gibbons is unjustified.

2. Under the Warner-Brooks Test, Defendant's Plea Was Properly Entered.

Defendant argues that even if Gibbons does not apply, the record below still establishes that Judge Uno abused his discretion in refusing to grant defendant's Motion to Withdraw his Guilty Plea. Defendant claims that the record establishes an abuse of discretion because Judge Banks failed to strictly adhere to the procedures outlined in Utah Code Ann. § 77-35-11(e)(Supp. 1988). Rule 11(e) prescribes the procedures to be followed by a trial court in accepting a guilty plea:

> The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:
>
> (1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;
> (2) That the plea is voluntarily made;
> (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
> (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements:
> (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
> (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.
> If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a less included offense, or the dismissal of other charges, the same shall be approved

> by the court. If recommendations as to sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

Specifically, defendant alleges that Judge Banks failed to comply with three subsections of Rule 11(e): (1) that defendant was not informed of his constitutional rights and the waiver thereof as required by Rule 11(e)(3); (2) that defendant did not understand the nature and elements of the offense to which he was entering the plea as required by Rule 11(e)(4); and, (3) that defendant did not know the possibility of the imposition of a consecutive sentence as required by Rule 11(e)(5).

As noted above, the Warner-Brooks standard governs the requirements of Rule 11(e) in this case. Warner v. Morris, 709 P.2d 309 (Utah 1985); Brooks v. Morris, 709 P.2d 310 (Utah 1985). See also State v. Miller, 718 P.2d 403 (Utah 1986). Under Warner-Brooks, the "record as a whole" standard is applied by the appellate court to determine whether the defendant entered his plea with full knowledge and understanding of the offense of which he had been charged, its elements, and the nature of the sentence he may receive.

In Warner & Brooks, the trial court failed to ask specifically if "he [defendant] was aware that he had a right against compulsory self-incrimination" Warner, 709 P.2d at 310. Despite the trial court's failure to address the issue, the Supreme Court stated "that the record as a whole affirmatively establishes that defendant entered his plea with full knowledge and understanding of its consequences. . . ." Id. at 310.

In Miller, the defendant argued the trial court abused its discretion by refusing to allow him to withdraw his guilty plea since he did not understand the nature of the charges against him or the consequences of his plea. Miller, 718 P.2d at 405. This Court found that although the trial court did not make a specific finding to this effect, "the absence of a finding under this section is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving . . . ." Id.

Miller, Warner and Brooks indicate that a trial court accepting a guilty plea is not constitutionally required to do all that Rule 11(e) lists. Constitutionally, all that is required is that the overall record discloses the defendant voluntarily and intelligently entered his guilty plea.

In the instant case, the record as a whole establishes that defendant entered his guilty plea intelligently and voluntarily in accordance with § 77-35-11(e). In particular, the record establishes that defendant understood the nature and elements of the offense to which he pled guilty and the relationship of the facts to the law as required by Rule 11(e)(4). At the preliminary hearing on September 8, 1983, defendant waived a formal reading of the information (R. 4). The victim, Michael Steven Terry, testified twice about the assault (R. 4). During his second statement, Mr. Terry's testimony consisted of the fact that the upper part of his ear was missing (R. 5). Defendant was present during the testimony (R. 5).

Defendant was arraigned in the District Court on November 3, 1983 (R. 12). A copy of the information was handed to defendant and he entered a plea of "not guilty" to the Mayhem charge (R. 12). The probable cause statement in the information clearly sets forth the fact that defendant was charged with biting off the upper portion of Mr. Terry's ear (R. 11) (See Addendum "A"; Information). On January 24, 1984, defendant entered a plea of "guilty" to Attempted Mayhem. (R. 16). The following dialogue occurred at the change of plea hearing:

The Court: Have you gone over your constitutional rights and the waiver thereof as set forth in your affidavit?

Mr. Velarde: Yes, sir.

The Court: Any questions you would care to ask the Court with reference to your constitutional rights or the waiver thereor?

Mr. Velarde: No, sir.

The Court: Has there been any promises made to you to get you to enter a plea?

Mr. Velarde: No, sir.

The Court: Has there been any promises made as to what the Court would do on sentencing in this case?

Mr. Velarde: No, sir.

The Court: By entering a plea to the included offense, that carries of sentence of zero to five years in the Utah State Penitentiary and/or a fine not to exceed $5,000. By entering a plea of guilty, you do, in fact, admit the acts that support that charge.

How old are you?

Mr. Velarde: 28, sir.

The Court: Do you read and write the English language?

Mr. Velarde: Yes.

The Court: Have him execute the affidavit.

Are you presently under the influence of any durge, narcotics or alcoholic beverages?

Mr. Velarde: No, sir.

The Court: Do you feel you have any physical or mental disability as such that interferes with your free choice to enter such a plea?

Mr. Velarde: No, sir.

The Court: Are you freely and voluntarily entering a plea of guilty at this time?

Mr. Velarde: Yes.

The Court: All right. To the included offense of attempted mayhem, a third-degree felony as I have described it to you, which occurred at 73 East 400 South, in Salt Lake County State of Utah, on or about March 4, 1983, In violation of Title 76, Chapter 5, Section 102, Utah Code Annotated, 1953, as amended, in that you, Jerry Lee Velarde, attempted to commit Mayhem upon Michael S. Terry by unlawfully and intentionally depriving Michael S. Terry of a member of his body, to wit: an ear, and/or by unlawfully and intentionally slitting the ear of Michael S. Terry, whay now is your plea? Guilty or nor guilty?

Mr. Velarde: Guilty.

The Court: Plea of guilty is received, and the Court finds that is was freely and voluntarily made by the defendant, that he is not presently under the influence of any durgs, narcotics or alcoholic beverages, nor has a physical or mental disability as such that interferes with his free choice to enter such a plea.

I base those findings on my observations of the defendant here in the courtroom, together with the questions that were put to him and his responses thereto.

You have a right to be sentenced in not less than two no more than 30 days. What is your preference?

Mr. Valdez: We would waive the minimum time, your honor, and ask you to sentence him today.

The Court: You understand, by being sentenced today, I would commit you to the penitentiary?

Mr. Velarde: Yes, sir.

The Court: It is the judgment of the court that you be sentenced to -- are you out at the penitentiary now?

Mr. Velarde: Yes, I am.

The Court: I neglected to tell you, then -- I wasn't aware of that -- I can allow that to run consecutively or concurrently with the sentence you are presently serving out there.

Do you understand that?

Mr. Velarde: Yes.

(R. 88; Addendum "A" at pp. 2-5) (emphasis added).

As shown above, defendant clearly received "real notice of the true nature of the charge against him." Henderson v. Morgan, 426 U.S. 637, 645 (1976). Furthermore, based upon the preliminary hearing testimony, defendant understood "the elements of the crimes charged and the relationship of the law to the facts." Gibbons, 740 P.2d at 1312.

The Plea Hearing Transcript and the Plea Affidavit also establish that defendant understood the constitutional rights he was waiving by means of entering a guilty plea as reqired by Rule 11(e)(3). Judge Banks asked defendant whether he understood his constitutional rights as explained in the Plea Affidavit (Addendum "A" at p. 2). The Plea Affidavit explains that a guilty plea is a waiver of the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers (R. 16; Addendum "C"). Defendant acknowledged that he understood his rights. Id.

Lastly, the record establishes that defendant understood the full legal consequences of his guilty plea as required by Rule 11(e)(5). As quoted above, Judge Banks explained to defendant that a guilty plea to the Attempted Mayhem charge would carry a maximum sentence of zero to five years and/or a fine of $5,000. Id. The Judge further explained that he

could order the sentences to run consecutively or concurrently with defendant's other sentence. Id. at 5. Notably, the Judge ordered concurrent, not consecutive sentences. Id. at 5.

Overwhelmingly, the trial record establishes that defendant understood the nature and elements of the charge, the constitutional rights waived by entering a plea of guilty, the maximum penalties which may be imposed, and the fact that the Judge may order the sentence to run concurrently or consecutively with defendant's other sentence. Thus, Judge Uno did not abuse his discretion in finding that defendant's plea was properly entered pursuant to Rule 11(e).

CONCLUSION

Based upon the foregoing, respondent respectfully requests this Court to affirm the lower court's denial of defendant's Motion to Withdraw Guilty Plea.

DATED this 17th day of February, 1989.

R. PAUL VAN DAM
Attorney General

DAN R. LARSEN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Respondent was mailed, postage prepaid, to Manny Garcia and Joan C. Watt, Salt Lake Legal Defender Assoc. 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 17th day of February, 1989.

ADDENDA

ADDENDUM A

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

Issued by: R. Reese

THE STATE OF UTAH

BAIL: NO BAIL

VS.

Judge

JERRY LEE VELARDE

INFORMATION
Criminal No.

10/03/55

83FS 2217

Defendant(s).
(Address/DOB)

The undersigned Det. Shelton (SLCPD) under oath states on information and belief that the defendant(s) committed the crimes of:

MAYHEM, a Second Degree Felony, at 73 East 400 South, in Salt Lake County, State of Utah, on or about March 4, 1983, in violation of Title 76, Chapter 5, Section 105, Utah Code Annotated, 1953 as amended, in that the defendant, JERRY LEE VELARDE, a party to the offense, committed mayhem upon Michael S. Terry by unlawfully and intentionally depriving Michael S. Terry of a member of his body, towit: an ear, and/or by unlawfully and intentionally slitting the ear of Michael S. Terry;

NO BAIL REQUEST: The defendant, JERRY LEE VELARDE, is currently on parole from the Utah State Prison for other felony crimes. Therefore, pursuant to Article I, Section 8, Utah Constitution, it is requested that the defendant be held without bail on the above charge.

Affiant

This information is based on evidence obtained from the following witnesses:
Gordon Parks
Sgt. Mike Fierro
Michael S. Terry
James S. Holm

Subscribed and sworn to me this 22nd day of August 19 83.

Judge

Authorized for presentment and filing:

TED CANNON COUNTY ATTORNEY

DEPUTY COUNTY ATTORNEY

83FS 2217

PROBABLE CAUSE STATEMENT: The affiant, a Salt Lake City Police Detective, bases this on the following:

His reading of report # 83-1-7321, which states that, at the above time, date and location, the defendant, Jerry Lee Velarde, jumped on the victim, Michael S. Terry, and bit off the upper portion of the victim's ear, completely tearing the upper portion away from the ear itself.

ADDENDUM B

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

BEFORE THE HONORABLE JAY E. BANKS

--00000--

STATE OF UTAH,	)	ORIGINAL
PLAINTIFF,	)	
VS.	)	CASE NO. CR-83-1219
JERRY LEE VELARDE,	)	
DEFENDANT.	)	

TRANSCRIPT OF PROCEEDINGS

TAKEN AT: METROPOLITAN HALL OF JUSTICE; SALT LAKE CITY, UTAH

APPEARANCES:

FOR THE STATE OF UTAH: ERNIE JONES
DEPUTY COUNTY ATTORNEY

FOR THE DEFENDANT: JAMES VALDEZ, ESQ.
SALT LAKE LEGAL DEFENDER'S ASSOCIATION

DATE: JANUARY 24, 1984

Robyn Haynie
Haynie & Snider
817 Lake Street
Salt Lake City, Utah 84102
(801) 531-6116

SALT LAKE CITY, UTAH; TUESDAY, JANUARY 24, 1984

9:30 A.M.

--00000--

THE COURT: JERRY LEE VELARDE?

MR. VALDEZ: THAT'S MY MATTER, YOUR HONOR. THAT IS SET FOR A CHANGE OF PLEA.

THE COURT: ALL RIGHT. WHAT IS THE ANTICIPATED PLEA?

MR. VALDEZ: PLEA TO A THIRD DEGREE, ATTEMPTED.

THE COURT: ATTEMPTED MAYHEM? THIRD DEGREE, ATTEMPED MAYHEM?

IS YOUR TRUE AND CORRECT NAME JERRY LEE VELARDE?

MR. VELARDE: YES, SIR.

THE COURT: HAVE YOU GONE OVER YOUR CONSTITUTIONAL RIGHTS AND THE WAIVER THEREOF AS SET FORTH IN YOUR AFFIDAVIT?

MR. VELARDE: YES, SIR.

THE COURT: DO YOU UNDERSTAND THOSE RIGHTS THAT YOU ARE WAIVING?

MR. VELARDE: YES, SIR.

THE COURT: ANY QUESTIONS YOU WOULD CARE TO ASK THE COURT WITH REFERENCE TO YOUR CONSTITUTIONAL RIGHTS OR THE WAIVER THEREOF?

MR. VELARDE: NO, SIR.

THE COURT: HAS THERE BEEN ANY PROMISES MADE TO YOU TO GET YOU TO ENTER A PLEA?

MR. VELARDE: NO, SIR.

THE COURT: HAS THERE BEEN ANY PROMISES MADE AS TO WHAT THE COURT WOULD DO ON SENTENCING IN THIS CASE?

MR. VELARDE: NO, SIR.

THE COURT: HAS THERE BEEN ANY THREATS, DURESS OR ANY OTHER UNDUE INFLUENCE EXERTED ON YOU TO GET YOU TO ENTER A PLEA?

MR. VELARDE: NO, SIR.

THE COURT: BY ENTERING A PLEA TO THE INCLUDED OFFENSE, THAT CARRIES A SENTENCE OF ZERO TO FIVE YEARS IN THE UTAH STATE PENITENTIARY AND/OR A FINE NOT TO EXCEED $5,000. BY ENTERING A PLEA OF GUILTY, YOU DO, IN FACT, ADMIT THE ACTS THAT SUPPORT THAT CHARGE.

HOW OLD ARE YOU?

MR. VELARDE: 28, SIR.

THE COURT: DO YOU READ AND WRITE THE ENGLISH LANGUAGE?

MR. VELARDE: YES.

THE COURT: HAVE HIM EXECUTE THE AFFIDAVIT.

ARE YOU PRESENTLY UNDER THE INFLUENCE OF ANY DRUGS, NARCOTICS OR ALCOHOLIC BEVERAGES?

MR. VELARDE: NO, SIR.

THE COURT: DO YOU FEEL YOU HAVE ANY PHYSICAL OR

MENTAL DISABILITY AS SUCH THAT INTERFERES WITH YOUR FREE CHOICE TO ENTER SUCH A PLEA?

MR. VELARDE: NO, SIR.

THE COURT: ARE YOU FREELY AND VOLUNTARILY ENTERING A PLEA OF GUILTY AT THIS TIME?

MR. VELARDE: YES.

THE COURT: ALL RIGHT. TO THE INCLUDED OFFENSE OF ATTEMPTED MAYHEM, A THIRD-DEGREE FELONY AS I HAVE DESCRIBED IT TO YOU, WHICH OCCURRED AT 73 EAST 400 SOUTH, IN SALT LAKE COUNTY, STATE OF UTAH, ON OR ABOUT MARCH 4, 1983, IN VIOLATION OF TITLE 76, CHAPTER 5, SECTION 105, UTAH CODE ANNOTATED, 1953, AS AMENDED, IN THAT YOU, JERRY LEE VELARDE, ATTEMPTED TO COMMIT MAYHEM UPON MICHAEL S. TERRY BY UNLAWFULLY AND INTENTIONALLY DEPRIVING MICHAEL S. TERRY OF A MEMBER OF HIS BODY, TO WIT: AN EAR, AND/OR BY UNLAWFULLY AND INTENTIONALLY SLITTING THE EAR OF MICHAEL S. TERRY, WHAT NOW IS YOUR PLEA? GUILTY OR NOT GUILTY?

MR. VELARDE: GUILTY.

THE COURT: PLEA OF GUILTY IS RECEIVED, AND THE COURT FINDS THAT IT WAS FREELY AND VOLUNTARILY MADE BY THE DEFENDANT, THAT HE IS NOT PRESENTLY UNDER THE INFLUENCE OF ANY DRUGS, NARCOTICS OR ALCOHOLIC BEVERAGES, NOR HAS A PHYSICAL OR MENTAL DISABILITY AS SUCH THAT INTERFERES WITH HIS FREE CHOICE TO ENTER SUCH A PLEA.

I BASE THOSE FINDINGS ON MY OBSERVATIONS OF THE

DEFENDANT HERE IN THE COURTROOM, TOGETHER WITH THE QUESTIONS THAT WERE PUT TO HIM AND HIS RESPONSES THERETO.

YOU HAVE A RIGHT TO BE SENTENCED IN NOT LESS THAN TWO NOR MORE THAN 30 DAYS. WHAT IS YOUR PREFERENCE?

MR. VALDEZ: WE WOULD WAIVE THE MINIMUM TIME, YOUR HONOR, AND ASK YOU SENTENCE HIM TODAY.

THE COURT: YOU UNDERSTAND, BY BEING SENTENCED TODAY, I WOULD COMMIT YOU TO THE PENITENTIARY?

MR. VELARDE: YES, SIR.

THE COURT: IT IS THE JUDGMENT OF THE COURT THAT YOU BE SENTENCED TO -- ARE YOU OUT AT THE PENITENTIARY NOW?

MR. VELARDE: YES, I AM.

THE COURT: I NEGLECTED TO TELL YOU, THEN -- I WASN'T AWARE OF THAT -- I CAN ALLOW THAT TO RUN CONSECUTIVELY OR CONCURRENTLY WITH THE SENTENCE YOU ARE PRESENTLY SERVING OUT THERE.

DO YOU UNDERSTAND THAT?

MR. VELARDE: YES.

THE COURT: WHAT ARE YOU SERVING OUT THERE?

MR. VELARDE: FIVE TO LIFE.

THE COURT: IT WILL RUN CONCURRENTLY. I WILL SENTENCE YOU TO ZERO TO FIVE YEARS IN THE UTAH STATE PENITENTIARY. COMMITMENT WILL ISSUE FORTHWITH, AND I WILL ALLOW IT TO RUN CONCURRENTLY WITH THE FIVE TO LIFE SENTENCE YOU ARE PRESENTLY SERVING.

MR. VALDEZ: THANK YOU.

REPORTER'S CERTIFICATE

I, ROBYN HAYNIE, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 2 THROUGH 5, INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD UPON THE HEARING OF THE ABOVE-ENTITLED MATTER ON JANUARY 24, 1984, AND THAT SAID TRANSCRIPT CONTAINS ALL OF THE EVIDENCE, ALL OF THE OBJECTIONS OF COUNSEL AND RULINGS OF THE COURT, AND ALL MATTERS TO WHICH THE SAME RELATE.

DATED THIS 12TH DAY OF DECEMBER, 1988.

Robyn Haynie

ROBYN HAYNIE, CSR/RPR

ADDENDUM C

In the District Court of the Third Judicial District
State of Utah

JAN 2 4 1984

H. Dixon Hindley, Clerk 3rd Dist Co
By Pat Jones
Deputy Clerk

THE STATE OF UTAH,
Plaintiff

vs.

Jerry Lee Velarde
Defendant

Affidavit of Defendant

Criminal No. CR 83-1219

I, Jerry Lee Velarde, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of: Attempted Mayhem
(Name of Crime)

Elements:	Facts:
Def. attempted to unlawfully and intentionally deprive Michael S. Terry of a member of his body	

I have received a copy of the charge (Information) and understand the crime I am pleading guilty to is a Third Degree Felony
(Degree of Felony or Class of Misdemeanor)
and understand the punishment for this crime may be Zero to Five prison term, $5000 fine, or both. I am not on drugs or alcohol. My plea of guilty is freely and voluntarily made. I am represented by Attorney James A. Valdez who has explained my rights to me and I understand them.

1. I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.

2. I know that if I wish to have a trial, I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.

3. I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.

4. I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.

5. I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.

6. I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the preceeding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered

7. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed on me.

(1R)

or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be.

9. No promises or threats of any kind have been made to induce me to plead guilty. The following other charges pending against me, to-wit (Court case number(s) or count(s)):

Reduction of present charge

will be dismissed, and that no other charge(s) will be filed against me for other crimes I may have committed which are now known to the prosecuting attorney. I am also aware that any charge or sentencing concessions or recommendations or probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or counsel for the State, is not binding on the Judge and may not be approved by the Judge.

10 I have read this Affidavit, or I have had it read to me by my attorney, and I know and understand its contents. I am 28 years of age, have attended school through the 6th and I can read and understand the English language.

Dated this 24th day of Jan, 19 84.

Jerry Velarde
Defendant

Subscribed and sworn to before me in Court this 24th day of Jan, 19 84

Jay E Banks
Judge

CERTIFICATE OF DEFENSE ATTORNEY:

I certify that I am the attorney for Jerry Velarde, the defendant named above and I know he has read the Affidavit, or that I have read it to him, and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing Affidavit are in all respects accurate and true.

James A Valdez
Defense Attorney

CERTIFICATE OF PROSECUTING ATTORNEY:

I certify that I am the attorney for the State of Utah in its case against Jerry Velarde, defendant. I have reviewed the Affidavit of the defendant and find that the declarations are true and accurate. No improper inducements, threats, or coercions to encourage a plea have been offered the defendant. There is reasonable cause to believe the evidence would support the conviction of the defendant for the plea offered, and that acceptance of the plea would serve the public interest.

E Arlie Jones
Prosecuting Attorney

ORDER

Based upon the facts set forth in the foregoing Affidavit and certification, the Court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "Guilty" to the charge, set forth in the Affidavit be accepted and entered.

Done in Court this 24th day of Jan, 19 84.

ATTEST
H. DIXON HINDLEY
Clerk
By Pat Jones
Deputy Clerk

Jay E Banks
District Judge

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